Supreme Court, U.S.
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No. 01-408

IN THE

Supreme Court of the United States

THE HOLMES GROUP, INC.,

Petitioner,

--- v. ---

VORNADO AIR CIRCULATION SYSTEMS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The questions presented are:

1. Does 28 U.S.C. § 1295(a)(1) divest regional Circuits of jurisdiction to decide appeals of final decisions of district courts in cases wherein the well-pleaded complaint of the prevailing plaintiff does not allege any claim arising under federal patent law?

2. Did the Court of Appeals for the Federal Circuit err in concluding that this action "arises under" federal patent law for purposes of 28 U.S.C. §§ 1295(a)(1) and 1338(a)?

STATEMENT PURSUANT TO RULE 29.6

Respondent Vornado Air Circulation Systems, Inc. ("Vornado") has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. THE FEDERAL CIRCUIT HAS EXCLUSIVE APPELLATE JURISDICTION OVER SUITS IN WHICH ANY PLEADING – BE IT A COMPLAINT OR COUNTERCLAIM – ALLEGES A CLAIM ARISING UNDER FEDERAL PATENT LAW. 10

A. 28 U.S.C. § 1295(a)(1) Grants the Federal Circuit Exclusive Jurisdiction Over All Suits Involving Patent Law Claims, Whether Those Claims Are Set Forth in the Complaint or Pleaded as Counterclaims. 10

B. The Federal Circuit's Jurisdiction Over a Patent Counterclaim Conforms with the Well-Pleaded Complaint Rule. 14

C. Federal Circuit Jurisdiction Over Declaratory Judgment Actions with Patent Counterclaims is Necessary to Effectuate Congress' Intent to Secure Uniformity and Eliminate Forum Shopping.....20

II. THE FEDERAL CIRCUIT DID NOT ERR IN EXERCISING JURISDICTION OVER THIS APPEAL.....22

CONCLUSION.....24

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd., 895 F.2d 736 (Fed Cir. 1990) ..... passim

American First Federal, Inc. v. Lake Forest Park, Inc., 198 F.3d 1259 (11th Cir. 1999) 17

Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 188 U.S. 632 (1903) 15

Cardinal Chem. Co. v. Morton Int'l, 508 U.S. 83 (1993) 7, 11

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) ..... passim

Cincinnati Bell Telephone Co. v. Allnet Communication Servs., Inc., 17 F.3d 921 (6th Cir. 1994) 17

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 20

Duncan v. First Nat'l Bank of Cartersville, Ga., 597 F.2d 51 (5th Cir. 1979) 13

Fenton v. Freedman, 748 F.2d 1358 (9th Cir. 1984) 13

Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974) 13

Fogg v. Ashcroft,
254 F.3d 103 (D.C. Cir. 2001) 10

Franchise Tax Bd. v. Construction Laborers Vacation Trust,
463 U.S. 1 (1983) 7, 12, 15, 16

Gully v. First Nat'l Bank in Meridian,
299 U.S. 109 (1936) 22

Hanes Corp. v. Millard,
531 F.2d 585 (D.C. Cir. 1976) 14

Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.
93 F.Supp.2d 1140 (D. Kan. 2000) 5

Horsford v. Romeo,
407 F.2d 1302 (3rd Cir. 1969) 17

In re Innotron Diagnostics,
800 F.2d 1077 (Fed Cir. 1986) 2

Isenberg v. Biddle,
125 F.2d 741 (D.C. Cir. 1941) 13

Kuehne & Nagel v. Geosource, Inc.,
874 F.2d 283 (5th Cir. 1989) 13

Louisville & Nashville Ry. Co. v. Mottley,
211 U.S. 149 (1908) 15, 17

Mackay v. Unita Dev. Co.,
229 U.S. 173 (1913) 13

Merrell Dow Pharm. Inc. v. Thompson,
478 U.S. 804 (1986) 20

Midwest Indus., Inc. v. Karavan Trailers, Inc.,
175 F.3d 1356 (Fed Cir. 1999), *cert. denied*,
528 U.S. 1019 (1999) 5

National Research Bureau, Inc. v. Bartholomew,
482 F.2d 386 (3rd Cir. 1973) 13

National Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.,
28 F.3d 376 (3rd Cir. 1994) 17

Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co.,
206 F.2d 336 (9th Cir. 1953),
cert. denied, 346 U.S. 899 (1953) 13

Public Service Commission of Utah v. Wycoff Co.,
344 U.S. 237 (1952) 12

Rengo Co. Ltd. v. Molins Mach. Co.,
657 F.2d 535 (3d Cir.),
cert. denied, 454 U.S. 1055 (1981) 13

Schwartzkopf Dev. Corp. v. Ti-Coating, Inc.
800 F.2d 240 (Fed. Cir. 1986) 19

Spectacor Mgmt. Group v. Brown,
131 F.3d 120 (3rd Cir. 1997),
cert. denied, 523 U.S. 1120 (1998) 13

Swallow & Assoc. v. Henry Molded Products, Inc.,
794 F.Supp. 660 (E.D. Mich. 1992) 13

Tennessee v. Union & Planters' Bank,
152 U.S. 454 (1894) 15, 16

TrafFix Devices, Inc. v. Marketing Displays, Inc.,
532 U.S. 23, 58 U.S.P.Q.2d 1001 (2001) 6

Vornado Air Circulation Sys., Inc. v. Duracraft Corp.,
58 F.3d 1498 (10th Cir. 1995),
cert. denied, 516 U.S. 1067 (1996) 4

Xeta, Inc. v. Atex, Inc.,
825 F.2d 604 (1st Cir. 1987) 2, 16, 19

Federal Statutes

19 U.S.C. § 1337 3

28 U.S.C. § 1292(c) 20

28 U.S.C. § 1295 ..... 7, 8, 17, 19

28 U.S.C. § 1295(a)(1) ..... passim

28 U.S.C. § 1295(a)(6) 3

28 U.S.C. § 1331 15

28 U.S.C. § 1338 ..... 7, 8, 10, 14, 19, 22

28 U.S.C. § 1338(a) ..... passim

Federal Regulations

19 C.F.R. § 210.10 23

19 C.F.R. § 201.51(a) 6

Rules

FED. R. CIV. P. 3 ..... 7, 10

FED. R. CIV. P. 13(a) 7, 11, 21

Congressional Materials

H.R. REP. NO. 97-312 (1981) 20, 21

S. REP NO. 97-275 (1981) 21

Treatises

13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3566, at 83-87 (2nd ed.) 16

INTRODUCTION

This is a case about an effort to skirt the unifying jurisdictional reach of the United States Court of Appeals for the Federal Circuit. Faced with respondent's patent and trade dress complaint pending before the United States International Trade Commission, petitioner filed a declaratory judgment action in federal district court solely on the trade dress claim. Under the Federal Rules of Civil Procedure, respondent was obliged to assert its related patent claim as a compulsory counterclaim in that second proceeding. Applying its long-established *Aerojet* rule, the Federal Circuit recognized that it had jurisdiction over this case. *See Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F.2d 736 (Fed. Cir. 1990). In doing so, the court acted consistently with both the letter of the relevant jurisdictional statutes and with Congress' salutary intent to bring about greater uniformity in the body of patent law and curtail the then-growing sport of patent law forum-shopping.

Petitioner now wants to resurrect that long-discredited practice and, in the process, undo over a decade of settled procedure in the Federal Circuit. Nothing has changed since the *en banc* Federal Circuit, speaking unanimously through the voice of then-Chief Judge Howard Markey, thoughtfully examined this Court's decision in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). In his *Aerojet* opinion, Chief Judge Markey obediently examined this Court's opinion, delivered by Justice Brennan, and carefully distinguished from the *Christianson* setting the circumstance where, as here, the jurisdictional issue arises in connection with a compulsory counterclaim. That marked difference in contexts, particularly in the present setting of a declaratory judgment action, makes all the difference in the world.

Not only is the *Aerojet* rule well-settled in Federal Circuit practice and administration, the *en banc* court

emphasized that its pre-*Christianson* analytic approach dovetailed with this Court's eventual decision in *Christianson* itself. This consistent interpretation of the relevant jurisdictional provisions was first set forth by the Federal Circuit in 1986, in *In re Innotron Diagnostics*, 800 F.2d 1077 (Fed. Cir. 1986). The *Aerojet* rule was also followed, for example, by the First Circuit in *Xeta, Inc. v. Atex, Inc.*, 825 F.2d 604 (1st Cir. 1987). The correctness of the Federal Circuit's approach in the *Christianson* context, where counterclaims were not at issue, was ratified by this Court in *Christianson* itself. In short, not only did this Court not disapprove the Federal Circuit's already-settled interpretation, it affirmed the Federal Circuit's approach as to jurisdiction in *Christianson* itself. Upon careful analysis, it will thus be seen that petitioner has sown latter-day seeds of confusion over Federal Circuit procedures in the service of its grand litigation strategy. But the disruption that would attend the acceptance of petitioner's vast expansion of *Christianson's* limited rule tugs strongly at Congress' determination to bring greater coherence and consistency to the body of patent law through the unifying substantive reach of the Federal Circuit's mandate.

Aerojet, in short, stands fully consistent with *Christianson* and with the rules governing the orderly litigation of patent claims in federal courts. It is much too late in the day to disrupt the *Aerojet* framework, grounded as it is in both the text of the relevant jurisdictional provisions and in the policy animating Congress' creation of the Federal Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit is unreported and is found in the Joint Appendix ("JA") at JA33-34. The opinion of the United States District Court for the District of Kansas is reported at 93 F.Supp.2d 1140 and is found at JA88-98. The District Court's final judgment appears at JA99-100.

STATEMENT OF THE CASE

Respondent Vornado manufactures and sells distinctive household fans, to which it obtained a patent, U.S. Patent No. Re. 34,551 ("the '551 patent"). These unique fans include a front grill design that incorporates a series of spiral (arcuate) vanes. Petitioner Holmes is a competitor of respondent in the household fan business, and imports and distributes fans covered by Vornado's '551 patent and trade dress.

Vornado discovered that petitioner Holmes had been importing from China and distributing fans having the aforementioned spiral vanes. On November 26, 1999, Vornado filed a complaint with the United States International Trade Commission ("ITC") in an attempt to stop the illegal importation of petitioner's fans.[1] The ITC complaint is found at L61-86. Vornado's complaint alleged both patent and trade dress infringement and requested that the ITC initiate an investigation of Holmes's importation activities with respect to Holmes's fans and other products. To support its allegation of patent infringement, Vornado submitted a patent claim chart to the ITC showing Holmes's infringement of the '551 patent on an element-by-element basis. *See* Claim Chart at L144-147.

The ITC determined that Vornado had asserted a viable, non-frivolous claim for, among other things, patent infringement. Accordingly, the ITC instituted an investigation on January 21, 2000. The Federal Circuit had jurisdiction over any appeal from the ITC decision.[2]

Two weeks after Vornado filed the ITC action, petitioner Holmes commenced a district court action against Vornado in the U.S. District Court for the District of Kansas, seeking only a declaration that Holmes's sales of its products

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[1] The complaint was filed pursuant to § 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

[2] 28 U.S.C. § 1295(a)(6).

did not infringe Vornado's asserted trade dress in its spiral grill. *See* Holmes's District Court complaint at L1-17. Even though Holmes was acutely aware that Vornado had just asserted a non-frivolous claim of patent infringement against Holmes at the ITC, Holmes did not ask for a declaration regarding Vornado's '551 patent.[3] *See* Holmes's District Court complaint at L7-8.

Vornado answered Holmes's district court complaint, and asserted its compulsory patent counterclaim as a counterplaintiff, raising the same allegations of patent and trade dress infringement that Vornado raised in its earlier ITC complaint. *See* Vornado's Counterclaim at L98-102. Vornado stated in its counterclaim that the district court had jurisdiction under 28 U.S.C. § 1338(a) "since the matter in controversy arises under an act of Congress relating to patents." L98.

It is noteworthy that petitioner chose the Kansas district court to file its complaint because of its belief that the Tenth Circuit's decision in *Vornado Air Circulation Sys., Inc. v. Duracraft Corp.*, 58 F.3d 1498 (10th Cir. 1995), *cert. denied*, 516 U.S. 1067 (1996) ("*Vornado I*"), collaterally estopped Vornado from asserting a trade dress claim against Holmes. In *Vornado I*, the Tenth Circuit held that a product configuration would not be accorded protection under the Lanham Act when the configuration is a "described, significant inventive component" of an issued utility patent. *Id.* at 1500. Petitioner's complaint, however, revealed that it understood that Vornado would assert a compulsory counterclaim for patent infringement in response to

[3] It is difficult to reconcile how petitioner was motivated to file a declaratory judgment action regarding only trade dress infringement. Petitioner stated it was "reasonably apprehensive" that respondent would assert trade dress claims against it, yet petitioner was apparently not apprehensive that respondent would assert patent infringement claims. At the time petitioner filed its district court complaint, it knew of the pending patent infringement claims against it at the ITC. L8.

petitioner's decision to intentionally omit the patent claim. Thus, Holmes's race to the courthouse to file a complaint devoid of a patent infringement claim was designed to circumvent the jurisdiction of the Federal Circuit. Indeed, had Vornado been first and filed its action for patent and trade dress infringement against Holmes, any appeal resulting therefrom would have unquestionably been heard before the Federal Circuit.

Despite the Federal Circuit's ruling in *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999) that the Federal Circuit would be applying its own law when determining issues of protectable trade dress, and thereby calling into question the Tenth Circuit's holding in *Vornado I*, the Kansas district court applied the principles of collateral estoppel to grant summary judgment in favor of Holmes on the issue of trade dress infringement. The Kansas court, however, acknowledged that an intervening change in the law can be a sufficient basis for declining to apply collateral estoppel. JA93, *The Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 93 F.Supp.2d 1140 (D. Kan. 2000), reprinted at JA88-98. The district court also stated that the Federal Circuit trade dress law was "now clearly at odds with the Tenth Circuit law underlying the judgment in *Vornado I*." JA95. The district court recognized that "the Federal Circuit has exclusive jurisdiction over an appeal from a final judgment of a district court if the district court's jurisdiction is based in whole or in part on a patent claim," and stated that, based on Vornado's counterclaim alleging patent infringement, "it is possible (although not entirely certain) that any appeal of this court's judgment will be to the Federal Circuit." JA94.

Vornado appealed the district court's partial final judgment to the United States Court of Appeals for the Federal Circuit (Appeal No. 00-1286). Lacking the resources to simultaneously litigate at the ITC, in Massachusetts, and

in Kansas,[4] but aware of the ITC's obligation under 19 CFR § 210.51(a) to resolve cases quickly and that it lacked a procedure permitting ITC cases to be stayed, Vornado entered into an agreement with Holmes. Pursuant to that agreement, the Kansas and Massachusetts suits were stayed pending a successful appeal by respondent. This stay, however, could not be effected in the ITC and thus, as part of this agreement, Vornado withdrew the ITC case with the understanding that it would seek reinstitution of the investigation, without objection from petitioner, if the Federal Circuit ruled in Vornado's favor.[5]

On June 5, 2001, the Federal Circuit vacated the judgment of the district court, and remanded the case for proceedings in light of *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 58 U.S.P.Q.2d 1001, (2001).[6] The Federal Circuit Order is found at JA33-34. Holmes then petitioned this Court for a writ of certiorari. This Court granted the petition on November 8, 2001.

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[4] Petitioner also filed suit against respondent in the Massachusetts district court claiming tortious interference with business practices.

[5] Contrary to Holmes's assertion that the "counterclaim was effectively withdrawn," Vornado's counterclaim against Holmes for infringement of the '551 patent was stayed, but is still pending in the district court. Petitioner's Br. at 10, n.8, JA102.

[6] Petitioner states that *TrafFix* resolved a conflict between the Federal Circuit and the Tenth Circuit in the area of trade dress law. Petitioner's Br. at 6, n.5. However, this assertion paints a misleading picture. The conflict was actually between the various courts of appeals, where the Fifth, Seventh, and Federal Circuit courts applied one standard, and the Tenth Circuit (in *Vornado I*) applied a completely different standard. *TrafFix*, 532 U.S. 23, 58 U.S.P.Q.2d at 1004. The Court did not, as petitioner infers, adopt the standard set forth by the Tenth Circuit in *Vornado I*. *Id.* at 1007.

SUMMARY OF THE ARGUMENT

Based on its carefully-reasoned *en banc* decision in *Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F.2d 736 (Fed. Cir. 1990), the Federal Circuit correctly held that it had jurisdiction over this patent law case. Read together, 28 U.S.C. §§ 1295 and 1338 confer appellate jurisdiction upon the Federal Circuit over "any civil action arising" "in whole or in part" "under any Act of Congress relating to patents." As a matter of plain language, the present action arose in part under patent law because one of the claims in this case – the compulsory counterclaim – is a patent law claim. While petitioner stresses that a "civil action" is "*commenced* by filing a complaint," FED. R. CIV. P. 3, the action continues with the filing of counterclaims. Thus, this Court explained in *Cardinal Chemical Co. v. Morton Int'l*, 508 U.S. 83 (1993), that a defendant who raised a counterclaim arising under the patent laws had "properly invoked the *original jurisdiction* of the District Court" under § 1338. *Id.* at 98 (emphasis added).

This conclusion is further compelled by the posture of this declaratory judgment action. "Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983). Examining a declaratory defendant's *compulsory* counterclaim for allegations of patent infringement is particularly logical, since that claim is by definition part of the same "transaction or occurrence" underlying the plaintiff's claim. FED. R. CIV. P. 13(a). Any other conclusion would permit patent infringers to evade Federal Circuit jurisdiction by filing preemptive declaratory judgment actions raising related claims but omitting the patent law claims, knowing full well that the patent holder would then

have to plead its infringement claim as a compulsory counterclaim.

Even outside the present context, this Court has *never* held that counterclaims cannot provide the basis for "arising under" jurisdiction. Instead, this Court's precedents, including *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), hold that *defenses* – rather than *claims* – cannot provide the basis for jurisdiction. In contrast, the First Circuit as well as the Federal Circuit have long held that in the unique context of Federal Circuit jurisdiction, counterclaims must be considered to effectuate Congress' intent to achieve uniformity in patent law and eliminate forum shopping by declaratory judgment plaintiffs.

In *Christianson*, this Court likewise recognized that "arising under" principles must be "appropriately adapted to § 1338(a)." *Id.* at 809. This point is important because petitioner relies heavily on cases involving federal trial court jurisdiction at the outset of a case. Those cases necessarily focus on the content of the complaint alone (i) for the practical reason that jurisdiction must be decided at the outset of the case; (ii) to avoid federal-state conflicts since *state* courts would otherwise have jurisdiction; and (iii) in deference to the plaintiff's choice of forum. In this different context, none of these considerations applies. In contrast, the question is which federal appellate court will decide the case after it has been tried, *and Congress has provided for exclusive federal court jurisdiction for the precise purpose of preventing alleged infringers from forum shopping by filing declaratory judgment actions in a circuit of their choosing.* Thus, petitioner's reliance on his supposed right to hand-select the appellate court that would decide patent law claims flies in the face of Congress' intent.

As such, there can be no question that this case arises under federal patent law for purposes of 28 U.S.C. §§ 1295 and 1338. Respondent's answer does not merely assert a patent law defense. To the contrary, respondent's answer pleads a nonfrivolous, compulsory counterclaim for patent

infringement. That claim was pending before the International Trade Commission when petitioner filed its district court complaint, and the ITC has since determined that the claim is viable. As a result, it is petitioner, not respondent, who would manipulate jurisdictional rules by bringing a declaratory judgment action that conveniently omits an integral patent law claim. Accordingly, the Federal Circuit's long-established jurisdictional principles, as set forth by then-Chief Judge Markey for a unanimous *en banc* court, should be sustained.

ARGUMENT

I. THE FEDERAL CIRCUIT HAS EXCLUSIVE APPELLATE JURISDICTION OVER SUITS IN WHICH ANY PLEADING – BE IT A COMPLAINT OR COUNTERCLAIM – ALLEGES A CLAIM ARISING UNDER FEDERAL PATENT LAW.

A. 28 U.S.C. § 1295(a)(1) Grants the Federal Circuit Exclusive Jurisdiction Over All Suits Involving Patent Law Claims, Whether Those Claims Are Set Forth in the Complaint or Pleaded as Counterclaims.

In 1982, Congress created the Court of Appeals for the Federal Circuit and vested in it exclusive jurisdiction over appeals from the federal district courts when "the jurisdiction of that [district] court was based, *in whole or in part*, on Section 1338 of this title." 28 U.S.C. § 1295(a)(1)(emphasis added). Section 1338 confers original jurisdiction upon the federal district courts over "any civil action arising under any Act of Congress relating to patents." 28 U.S.C. § 1338(a). JA104-105. Read together, these two sections grant appellate jurisdiction to the Federal Circuit over "any civil action arising," "in whole or in part," "under *any* Act of Congress *relating to* patents."

As a matter of plain language, the present action arose in part under the patent law because one of the claims in this case – the counterclaim – is a patent law claim. Petitioner stresses that "[a] civil action is *commenced* by filing a complaint." FED. R. CIV. P. 3. Nothing in that rule nor this Court's precedent suggests, however, that a complaint defines the metes and bounds of a civil action. Instead, a civil action continues with the filing of counterclaims. *See, e.g., Fogg v. Ashcroft*, 254 F.3d 103, 107 (D.C. Cir. 2001)

(noting the Federal Rules of Civil Procedure define a civil action as "all claims for relief alleged in a single lawsuit").

This Court recognized as much in *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). There the Court observed that the counterclaim in the declaratory judgment action "properly invoked the *original jurisdiction* of the District Court" under §1338. (Emphasis added). This Court stated:

> In this case, therefore, it is perfectly clear that the District Court had jurisdiction to entertain Cardinal's counterclaim for a declaratory judgment of invalidity. It is equally clear that the Federal Circuit, even after affirming the finding of noninfringement, had *jurisdiction* to consider Morton's appeal from the declaratory judgment of invalidity. A party seeking a declaratory judgment of invalidity presents a claim independent of the patentee's charge of infringement. If the District Court has jurisdiction (established independently from its jurisdiction over the patentee's charge of infringement) to consider that claim, so does (barring any intervening events) the Federal Circuit.

Id. at 96.

The conclusion that this action arises in part from respondent's counterclaim is confirmed by the *compulsory* nature of that counterclaim. Under the Federal Rules of Civil Procedure, a defendant's answer "*shall* state as a counterclaim any claim which . . . the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." FED. R. CIV. P. 13(a) (emphasis added). In this case, petitioner's patent infringement is intertwined with its trade dress infringement, and was therefore *required* to be raised as a counterclaim. As a result, it strains credulity to suggest, as petitioner does, that the patent law claims do not

underlie this lawsuit every bit as much as the trade dress claims do. The plaintiff may be the master of his own complaint, but the compulsory counterclaim rule requires that the plaintiff's and defendant's claims be joined together in a single action regarding the entire "transaction or occurrence" – regardless of whether the plaintiff, as here, tactically omits some of the related claims from his declaratory judgment complaint.

In similar contexts, courts have long recognized that the resolution of jurisdictional issues requires consideration of the entire action, not just the plaintiff's claims. In declaratory judgment actions (like this one), courts have examined the "character of the threatened action," not just the declaratory judgment complaint. *Public Service Comm'n of Utah v. Wycoff Co.*, Inc., 344 U.S. 237, 248 (1952). As this Court has explained, "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983).[7] In this case, examining a compulsory counterclaim for allegations of patent infringement is logical, since "in many actions for declaratory judgment, the realistic position of the parties is reversed," *Public Service Comm'n*, 344 U.S. at 248, and there is no question that in an original action respondent would have pleaded its patent law claims, which it was then pursuing before the ITC.

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[7]In *Franchise Tax Board*, the Court went on to decide, for reasons specific to the text of the Employee Retirement Income Security Act and federal-state comity issues which do not apply here, that a suit brought *by a state* for a declaration of the validity of *state* law is not removable. *See* 463 U.S. at 21. Based on the same "common sense accommodation of judgment to kaleidoscopic situations" that the Court applied in that case, *id.* at 20 (internal quotation omitted), a suit brought by an alleged patent infringer should be subject to the jurisdiction of the court created to handle patent cases – the Federal Circuit.

Moreover, even outside the declaratory judgment context, courts have looked to a party's counterclaim to invoke jurisdiction. For example, courts have repeatedly retained jurisdiction and adjudicated a counterclaim having its own jurisdictional basis even where the court had no jurisdiction over the complaint. *Rengo Co. Ltd. v. Molins Mach. Co.*, 657 F.2d 535, 539, (3rd Cir.), *cert. denied*, 454 U.S. 1055 (1981) ("[A] jurisdictional defect in the complaint will not preclude adjudication of a counterclaim over which the court has an independent [§1338] basis of jurisdiction."); *Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co.*, 206 F.2d 336, 336-37 (9th Cir.), *cert. denied*, 346 U.S. 899 (1953) ("The counterclaim persists where it is supported by an independent basis [diversity] for jurisdiction," even though complaint was dismissed); *Isenberg v. Biddle*, 125 F.2d 741, 743 (D.C. Cir. 1941) (holding that where independent jurisdictional basis [Trading With The Enemy Act] exists for counterclaim that seeks affirmative relief, "it is sustainable without regard to what happens to the original complaint"); *National Research Bureau, Inc. v. Bartholomew*, 482 F.2d 386, 389 (3rd Cir. 1973) (holding that a counterclaim supported by independent jurisdiction afforded the district court federal jurisdiction: "[W]here, as here, jurisdiction is independent, the counterclaim must be allowed to proceed without regard to the fate of the original claim."); *see also, e.g., Ferguson v. Eakle*, 492 F.2d 26, 28 (3rd Cir. 1974); *Duncan v. First Nat'l Bank of Cartersville, Ga.*, 597 F.2d 51, 55, n.3 (5th Cir. 1979); *Kuehne & Nagel v. Geosource, Inc.*, 874 F.2d 283, 291 (5th Cir. 1989).

Courts have also stressed the importance of including compulsory counterclaims, rather than the complaint alone, in calculating the "amount in controversy" for diversity jurisdiction. *See, e.g., Mackay v. Unita Dev. Co.*, 229 U.S. 173, 176 (1913); *Spectacor Magmt. Group v. Brown*, 131 F.3d 120, 121 (3rd Cir. 1997), *cert. denied*, 523 U.S. 1120 (1998); *Swallow & Assoc. v. Henry Molded Products, Inc.*, 794 F. Supp. 660 (E.D. Mich. 1992); *Fenton v. Freedman*, 748 F.2d 1358 (9th Cir. 1984). This is yet another recognition of the reality

that compulsory counterclaims, not just the plaintiff's claims, should play a central role in jurisdictional determinations.

In this context, any other conclusion would sanction wholesale evasion of the Federal Circuit's jurisdiction. Any time a patent infringer expected an infringement suit to be brought, it could file a declaratory judgment action raising related claims but not patent law claims. As in this case, the patent holder would then be required to plead the patent law claims as compulsory counterclaims. But under petitioner's view, that gamesmanship would defeat Federal Circuit jurisdiction. The Court should not permit litigation to devolve into this sort of tactical and "disorderly race to the courthouse" through the use of declaratory judgments. *Hanes Corp. v. Millard*, 531 F.2d 585, 593-94 (D.C. Cir. 1976).

B. The Federal Circuit's Jurisdiction Over a Patent Counterclaim Conforms with the Well-Pleaded Complaint Rule.

Petitioner argues at length that the Federal Circuit failed to comply with the well-pleaded complaint rule, as articulated in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Petitioner is doubly wrong. As explained above, respondent's well-pleaded counterclaim confers jurisdiction on the Federal Circuit. In addition, *Christianson* had no occasion to address this issue and did not do so.

In *Christianson*, this Court looked to its cases interpreting the "arising under" language found in other jurisdictional provisions and held that a case "arises under" patent law in the context of § 1338 when a patentee "set[s] up some right, title or interest under the patent laws." In doing so, this Court recognized that "arising under" principles must be "appropriately adapted to § 1338(a)." *Id.* at 807, 809. This interpretation parallels the "well-pleaded complaint rule" used to define the scope of federal-question jurisdiction under 28 U.S.C. § 1331. *Id.* at 808.

The well-pleaded complaint rule was "laid down" in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 459 (1894), which held a court may act on a question of United States law "only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law." As this Court subsequently explained:

> "It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case."

Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 638-639 (1903).

An important purpose of the well-pleaded complaint rule is to provide a "quick rule of thumb" in resolving federal-state jurisdictional conflicts. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 11 (1983). The rule allows courts to avoid having "to go to any matters of defense which the defendants might possibly set up." *Louisville & Nashville Ry. Co. v. Mottley*, 211 U.S. 149, 153 (1908), quoting *Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co.*, 188 U.S. 632 (1903). It also allows an early determination of proper jurisdiction at the pleading stage of a case, and prevents uncertainties regarding whether a party will raise an issue later in litigation that could implicate jurisdiction. *See Christianson*, 486 U.S. at 814 (holding jurisdiction is not determined by the "well-tried case"). Thus, the scope of the well-pleaded complaint doctrine and, concomitantly, the power of a court to hear a case is defined by two principles: *first*, that the right to sue in a federal court "cannot depend on the defense which the defendant may choose to set up," and *second*, that the jurisdiction of the court must be invoked

at the time when the claim is brought. *See Tennessee v. Union & Planters' Bank*, 152 U.S. at 459.

This Court continued to employ these principles to divine when an action arises under the Constitution or the laws of the United States. In light of these defining principles, the well-pleaded complaint rule has been applied in three ways: *first*, to bar federal jurisdiction that is based solely on a defense raised in an answer; *second*, to bar federal jurisdiction based upon a plaintiff's anticipation of a defense that could possibly be raised by the defendant; and *third*, to bar federal jurisdiction based upon allegations to support a case "that are not required by nice pleading rules." 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3566, at 83-87 (2nd ed.).

These applications of the well-pleaded complaint rule, however, are a far cry from the situation here. The well-pleaded complaint rule allows federal jurisdiction over a claim raising a federal question properly invoked at the time and in the form prescribed by law. *See Franchise Tax*, 463 U.S. at 22, n.24 (recognizing that a properly filed counterclaim might provide an independent jurisdictional basis). *See also Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F.2d 736, 740 (Fed. Cir. 1990); *Xeta, Inc. v. Atex, Inc.*, 825 F.2d 604, 606 (1st Cir. 1987).

Thus, a clear and simple test to determine whether a case arises under patent law for purposes of § 1295(a)(1) is to look to the patentee's claim of infringement at the time it is pled, whether it is found as a claim in a complaint or as a counterclaim in an answer. The critical question under *Union & Planters' Bank* through *Christianson* is whether the patentee has asserted a claim to "some right, title or interest under the patent laws." *Christianson*, 486 U.S. at 807. If so, the jurisdiction of the Federal Circuit is properly invoked under 28 U.S.C. § 1295(a)(1).

Our position fully supports the defining principles of the well-pleaded complaint rule as appropriately adapted to §§ 1338(a) and 1295(a)(1). By looking to the pleadings,

including whether a patentee asserts a counterclaim of infringement, the appellate jurisdiction of the Federal Circuit is invoked without reference to anticipated defenses and at the time the case is filed. Indeed, this test conforms with the well-pleaded complaint rule because it focuses on *claims* rather than the uncertainty associated with issues that might arise during litigation.[8] *Christianson*, 486 U.S. at 809; *Christianson*, 486 U.S. at 820, n.1 (Stevens, J., concurring)(noting that the rule "ferret[s] out claims from issues"); *Louisville & Nashville Ry. Co.*, 211 U.S. at 153. The test also satisfies the purpose of the well-pleaded complaint rule. Indeed, "the 'well-pleaded complaint' rule. . . says nothing about whether [separating claims from issues] should be made only on the basis of the original complaint." *Christianson*, 486 U.S. at 820, n.1 (Stevens, J., concurring). Holding otherwise would confer jurisdiction under §1295 only when an assertion of patent infringement is found on the face of a complaint, but not when the same claim is posed as a counterclaim.[9] Nothing in law or logic suggests such an artificial approach.

Despite petitioner's assertion to the contrary, the exercise of appellate jurisdiction under 28 U.S.C. § 1295 over a case asserting a patent counterclaim is in no sense inconsistent with the holding in *Christianson*. This Court in *Christianson* ruled only on the narrow issue of whether the

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[8] Courts have differentiated between counterclaims and defenses, holding that a counterclaim is assertion of a *claim*, rather than a *defense*. *See, e.g., National Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.*, 28 F.3d 376, 393-94 (3rd Cir. 1994); *Cincinnati Bell Telephone Co. v. Allnet Communication Services, Inc.*, 17 F.3d 921, 923 (6th Cir. 1994); *American First Federal, Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1264-1265 (11th Cir. 1999); *Horsford v. Romeo*, 407 F.2d 1302, 1303 (3rd Cir. 1969).

[9] *Aerojet*, 895 F.2d at 742 ("It would seem at best incongruous to hold that we have appellate jurisdiction when a well-pleaded patent infringement claim is the basis of a pleading labeled 'complaint' but not when the *identical* well-pleaded claim is the basis of a pleading labeled 'counterclaim'").

Federal Circuit had jurisdiction over an appeal where a patent law issue was not necessary to the overall success of the asserted claim. *Christianson*, 486 U.S. at 810. After applying the well-pleaded complaint rule to the facts in *Christianson*, this Court held that the Federal Circuit did not have jurisdiction because no claim was pleaded that "set up some right, title or interest under the patent laws." *Id.* at 807. Critically, no patent law *claim* was made by either party-- neither in the complaint nor the answer.

Specifically, in *Christianson*, plaintiffs filed a complaint alleging violations of federal antitrust laws and, subsequently, a state law claim of tortious interference with business opportunities. *Id.* at 805. Defendant Colt answered denying violation of the antitrust laws and tortious interference, and counterclaimed alleging, among other things, misappropriation of trade secrets. Plaintiffs denied misappropriation of defendant's trade secrets, stating that Colt was not entitled to assert trade secret status to its confidential information because such information should have been disclosed in its patents. *Id.* This Court characterized plaintiff Christianson's patent-law issue as necessary only for a theory to its antitrust claims but not necessary for the overall success of the claims. *Id.* at 811.

Notwithstanding its ultimate decision that the Federal Circuit lacked jurisdiction, this Court did not hold in *Christianson* (or any other case for that matter) that only the complaint may be considered in deciding whether a claim arises under the patent laws. As such, *Christianson* manifestly does not stand for the destabilizing proposition that a non-frivolous counterclaim alleging patent infringement cannot provide the basis for appellate jurisdiction to the Federal Circuit under 28 U.S.C. § 1295(a)(1).

Instead, the relevant cases are those elaborately canvassed by the Federal Circuit in *Aerojet*. There, the Federal Circuit, sitting *en banc*, carefully evaluated the jurisdictional framework in a unanimous *en banc* opinion

authored by then-Chief Judge Markey. The Federal Circuit noted that in the *Christianson* litigation itself, the Federal Circuit had determined that it lacked jurisdiction in that matter, inasmuch as no patent claims or counterclaims were raised. *See* 895 F.2d at 741. So too in *Schwartzkopf Dev. Corp. v. Ti-Coating, Inc.*, the Federal Circuit had previously distinguished defenses from claims (including counterclaims) when it held that it lacked jurisdiction because a counterclaim was withdrawn at the pleading stage and before a responsive pleading had been filed. 800 F.2d 240, 244 (Fed. Cir. 1986).

Drawing on these cases, the *Aerojet* court went on to explain that because "no patent *claims* appeared in the complaint or in any counterclaim, *Christianson* is clearly distinguishable." 895 F.2d at 741. Instead, the dispositive point was that the defendant's "counterclaim for patent infringement is a separate, well-pleaded claim with its own jurisdictional basis and that basis is section 1338." *Id.* at 742. Moreover, "courts have repeatedly retained jurisdiction and adjudicated a counterclaim having its own jurisdictional basis even where the court had no jurisdiction over the complaint." *Id.* In the context of § 1295, therefore, the court concluded that "reliance upon a counterclaim with its own appeal-directing basis (§ 1338) as invoking our appellate jurisdiction accords with the well-pleaded complaint rule rightly understood." *Id.*

Chief Judge Markey also noted that a unanimous panel of the First Circuit, including then-Judge Breyer, had likewise transferred an appeal to the Federal Circuit because "the defendant included a viable patent counterclaim." *Xeta, Inc. v. Atex, Inc.*, 825 F.2d 604, 608 (1st Cir. 1987). In *Xeta*, the plaintiff brought antitrust and other claims against a competitor, and the defendant responded by filing a counterclaim for patent infringement. *Id.* at 605. The First Circuit concluded that "(1) the district court's jurisdiction was based 'in part' on 28 U.S.C. § 1338 where the defendant included a viable patent counterclaim; and (2) pursuant to

28 U.S.C. §§ 1295(a)(1) and 1292(c), the Federal Circuit properly has jurisdiction over the appeal . . . ." *Id.* at 608. These are the apposite authorities on the application of the well-pleaded complaint rule in the present context, not *Christianson.*

C. Federal Circuit Jurisdiction Over Declaratory Judgment Actions with Patent Counterclaims is Necessary to Effectuate Congress' Intent to Secure Uniformity and Eliminate Forum Shopping.

The Federal Circuit further recognized that its construction of the jurisdictional statutes is necessary to fulfill Congress' intent "to foster uniformity and preclude forum shopping." *Aerojet*, 895 F.2d at 744. In *Christianson*, this Court had recognized that "arising under" principles must be "appropriately adapted to § 1338(a)." 486 U.S. at 809. The *Aerojet* court likewise recognized that "'determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.'" 895 F.2d at 741 (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986)). "'[A] construction that undermines a statute's goal cannot stand.'" *Id.* at 745 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

Prior to the formation of the Federal Circuit in 1982, Congress recognized that the process of appealing patent cases to the regional circuits promoted "'mad and undignified races' between alleged infringers and patent holders to be the first to institute proceedings in the forum they consider most favorable." H.R. REP. NO. 312, 97TH CONG., 1ST SESS. 21 (1981). This forum-shopping, Congress concluded, "demean[ed] the entire judicial process and the patent system as well." *Id.* (citation omitted).

In creating the Federal Circuit, Congress wanted "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law." H.R. REP. NO. 97-312 at 23. Congress found inconsistency among the circuits in both the patent law itself and the application of the law to the facts of individual cases. *Id.* at 21; *see also* S. REP. NO. 275, 97TH CONG., 1ST SESS. 13 (1981). This variability lead to forum shopping as patentees would scramble to get into the "pro-patent" circuits and alleged infringers would run to "anti-patent" circuits. H.R. REP. NO. 97-312 at 20-21 (citing the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 15, 144-57, 67 F.R.D. 195, 214, 361-76 (1975)). The resultant unpredictable outcome of contemplated litigation hindered industrial innovation and effective business planning. H.R. REP. NO. 97-312 at 20, 22 (citing the Industrial Research Institute's poll showing that leading industrial companies overwhelmingly favored a centralized patent appeals court.) Congress concluded that creation of the Federal Circuit would strengthen the United States patent system by providing consistent and uniform law and eliminating the widespread forum-shopping that existed in the adjudication of patent cases.

Respondent's position adheres to Congressional intent of promoting the uniformity of patent law and discouraging forum-shopping. As the Federal Circuit reasoned in *Aerojet*, "Congressional goals are facilitated when appeals in cases involving nonfrivolous claims arising under the patent laws, whether found in complaints or in compulsory counterclaims, are directed to this court." *Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F.2d 736, 744 (Fed. Cir. 1990). Moreover, there is no fear that a patentee might manipulate appellate jurisdiction as he is bound by rule to file his compulsory counterclaim at the pleading stage. *See* FED. R. CIV. P. 13(a).

On the other hand, the potential for manipulation of appellate jurisdiction by infringers and patentees alike will again surface under the scheme proposed by petitioners.

> Congress' goal of ensuring that appeals of patent-law claims go to the Federal Circuit would be thwarted by determining that court's appellate jurisdiction only through an examination of the complaint as initially filed. That approach would enable an unscrupulous plaintiff to manipulate appellate court jurisdiction by the timing of the amendments in its complaint.

Christianson, 486 U.S. at 823-824 (Stevens, J., concurring). Likewise, "[d]irecting appeals involving compulsory counterclaims for patent infringement to the twelve regional circuits could frustrate Congress' desire to foster uniformity and preclude forum shopping." *Aerojet*, 895 F.2d at 744.

II. THE FEDERAL CIRCUIT DID NOT ERR IN EXERCISING JURISDICTION OVER THIS APPEAL.

The Federal Circuit properly asserted jurisdiction over this appeal, following the law of this Court in *Christianson* and respecting the intent of Congress to promote a uniform body of patent law. Briefly stated, it is undisputed that respondent Vornado timely plead a non-frivolous counterclaim of patent infringement – a claim which unquestionably arose under, indeed was created by, the patent laws of the United States. Thus, in every sense, the Federal Circuit followed the defining principles, as adapted to 28 U.S.C. § 1338, of the well-pleaded complaint rule, and thereby properly asserted jurisdiction under 28 U.S.C. § 1295(a)(1). As Justice Cardozo advised in *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117 (1936), the Federal

Circuit applied "common-sense accommodation of judgment to [a] kaleidoscopic situation[]."

Here, as we chronicled earlier, respondent asserted first its claim of patent infringement in the International Trade Commission. In that action, Vornado fully apprised petitioner of the details of its patent claim including providing a detailed element-by-element analysis of the alleged patent infringement. As a result of Vornado's complaint and corresponding detailed infringement analysis, the ITC commenced an investigation of Vornado's claim. In instituting an investigation, the ITC recognized that Vornado had asserted a non-frivolous claim of patent infringement. *See* 19 C.F.R. § 210.10. Ignoring what it knew to be a patent dispute between the parties, however, petitioner filed its district court action in Kansas, claiming only that its fans did not infringe Vornado's trade dress. In response, Vornado asserted a compulsory counterclaim of infringement that was, just two weeks earlier, set forth in a complaint filed in the ITC.

In light of this procedural framework and as illuminated by *Christianson*, the pleadings in this case established "some right, title or interest under the patent laws" by way of respondent Vornado's non-frivolous counterclaim of patent infringement. *See Christianson*, 486 U.S. at 807. The principles of the well-pleaded complaint rule have thus been abundantly satisfied: the Federal Circuit's jurisdiction was not based upon a defense or issue that might have been asserted in the case, and the timing of the Federal Circuit's jurisdiction was set at the pleading stage of the case. Indeed, had petitioner not raced to the forum of its choosing, there would have been no dispute that the appeal of this case would properly be laid at the Federal Circuit. As the Federal Circuit recognized, "[i]t would seem at best incongruous to hold that [the Federal Circuit would] have appellate jurisdiction when a well-pleaded patent infringement claim is the basis of a pleading labeled 'complaint' but not when the *identical* well-pleaded claim is

the basis of a pleading labeled 'counterclaim.'" *Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.*, 895 F.2d 736, 742 (Fed. Cir. 1990).

Petitioner's conduct below, on the other hand, was precisely the type of forum-shopping Congress intended to prevent. Recognizing that the law of the Federal Circuit was unfavorable to its position, petitioner manipulated jurisdictional rules by bringing a declaratory judgment action that conveniently omitted a patent law claim integral to the case. To reward petitioner's conduct by sustaining its position, this Court must overrule a decade-long procedure of the Federal Circuit grounding its jurisdiction upon well-pleaded claims. To do so would profoundly disserve the intent of Congress to curtail forum-shopping and promote a uniform body of patent law.

CONCLUSION

For the reasons set forth above, the Federal Circuit's order should be affirmed.

Respectfully submitted,

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